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No. 611

In the Supreme Court of the United States

OCTOBER TERM, 1965.

CLINTON MARTIN FLEISHOUR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1965.

CLINTON MARTIN FLEISHOUR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner, Clinton Martin Fleishour, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the United States District Court for the Northern District of Illinois, Eastern Division, denying the petitioner recovery against the United States under 28 U.S.C. §§1346(b), 2674.

OPINIONS BELOW

The Court of Appeals unanimously affirmed the decision of the United States District Court for the Northern District of Illinois, Eastern Division. Its decision, not yet reported, is included herein as Appendix A.

The opinion of the District Court denying petitioner recovery is reported in 244 F. Supp. 762, and is included in the printed record.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 7, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). There was no petition for rehearing.

QUESTIONS PRESENTED

1. Whether the ruling of the District Court, affirmed by the Court of Appeals, vitiates and makes a nullity of this Court's holding in *United States* v. *Muniz*, 374 U.S. 150 (1963).

2. Whether the ruling of the District Court, affirmed by the Court of Appeals, was premised upon a constitutionally improper standard of care to be exercised by prison officials, *i.e.*, "calculated risk," a standard not applied to persons other than prisoners.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case arises under The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674. The petitioner contends that while he was incarcerated in a federal prison he was severely injured as the result of a breach of duty on the part of the prison officials, which duty is defined in

18 U.S.C. § 4042. The petitioner was denied recovery in the District Court, whose judgment was affirmed by the Court of Appeals, on the basis of a standard of care which violates the provisions of the Fifth and Fourteenth Amendments to the United States Constitution. These relevant provisions are set out in Appendix B.

STATEMENT OF THE CASE

This is an action under the Federal Tort Claims Act for money damages for personal injuries which arose out of an accident that occurred during the night of December 15-16, 1960, at McNeil Island, Washington, a federal penitentiary operated by the Bureau of Prisons, an agency of the United States.

On December 15-16, 1960, the petitioner, then 21 years old, was a federal prisoner confined at McNeil Island Penitentiary. Troy Lee Stringfellow, then 19 years old, was similarly confined therein.

While previously at Lompoc, Stringfellow received nine misconduct reports and was continuously in difficulty and segregation. Upon recommendation by the Classification Committee at the prison, he was ordered transferred to McNeil Island.

On December 13, 1960, the petitioner, Stringfellow and about 30 other prisoners were transferred from Lompoc to McNeil Island. All of them were assigned to the Admissions & Orientation Unit, where incoming prisoners are customarily housed until they are assigned to a specific program within the institution. All of the individuals in the group of transferees from Lompoc were interviewed individually by the Associate Wardens and Custodial Supervisors immediately upon arrival. Each prisoner's dossier went with him to McNeil Island and the

records of all the prisoners were available to the Bureau of Prisons officials at the prison as soon as they arrived.

From the time the prisoners arrived at McNeil Island on December 13 until the night of the assault, December 15-16, they remained in the Admissions & Orientation Building. The area in which the inmates slept has a dormitory room with two rows of beds on the first floor. Each of the three floors above the dormitory room has a cell block containing 20 individual cells, making a total of 60 one-man cells on the three floors. The inmates in the Admissions & Orientation Unit are kept in the individual cells rather than in the dormitory room when possible. On December 15-16 Fleishour and Stringfellow and approximately 40 other prisoners were assigned to the dormitory room for the night.

At 2:30 a.m. on December 16, 1960, Stringfellow assaulted the sleeping Fleishour by hitting him on the head with a tank type fire extinguisher which was situated in the dormitory, as were other dangerous objects.

The Bureau of Prison employee in charge of the Admissions & Orientation Unit from 12:15 a.m. to 8:15 a.m., December 16, was Senior Correctional Officer Claude O. Connell, who, alone, had responsibility for the supervision of the cell blocks on the upper three floors and the dormitory.

At the time of the assault Officer Connell was at his station in the Admissions & Orientation Unit on the floor above the dormitory. He heard a noise and checked his immediate surroundings on "A" tier. Upon hearing the noise again, he immediately went to the floor below to investigate. When he entered the large dormitory, he found an inmate holding Stringfellow, who was trying

desperately to take off a pair of prison-issue socks which he was wearing on his hands, and petitioner lying on the floor, his head, back, and shoulders covered with blood. Officer Connell was informed by the inmates as to what had occurred, and Stringfellow later admitted his act.

Fleishour was virtually blinded in one eye and otherwise seriously injured through Stringfellow's unprovoked act.

Among the "nine misconduct reports" received by Stringfellow at Lompoc were the following episodes, in the language of the official reports:

From a report of September 6, 1960:

> "Violation Fighting: Inmate Stringfellow assaulted inmate Wigfield in the L Unit day room. I entered the day room and found Wigfield in a dazed condition. Investigation revealed Stringfellow acting strangely. I questioned Stringfellow and he admitted he had assaulted Wigfield first with a chair and then with his feet. . . .
>
> "Adjustment Committee Disposition: Segregation . . ."

From a Parole Progress Report:

> "Institutional Progress: This offender has been continually involved in trouble and confined in segregation. Since his initial hearing in November, 1959, he has received nine misconduct reports for such violations as fighting, possession of contraband (intoxicants), two attempts to escape by sawing bars to get out of the building during night hours, clique and strongarm activities for commissary and homosexual acts, complaining about food and joint efforts to instigate a disturbance, destruction of Government property and assaulting another inmate. For these offenses he has been sent to segregation where he has been most of the time since his day of commitment.

The record is concrete evidence showing he has made a very poor adjustment to the institution and has not been willing to better himself . . . The institution is continually receiving information about Stringfellow in joint with other inmates for his active part in various acts of strongarming for commissary and for sex purposes. He is a negative influence on those around him and has caused this institution a considerable amount of trouble. It appears that he enjoys participating in antisocial activities here and apparently receives some kind of satisfaction from knowing that he is one of the strongarm clique members. All efforts at trying to help this individual have been unsuccessful and it is impossible to establish rapport with this individual because of his reluctance to cooperate. . . . He has never remained on a job long enough to make a complete work evaluation. At the time of this writing he is in segregation for assaulting another inmate.

From a Special Progress Report dated November 2, 1960:

"The record speaks for itself in his case. His conduct here has been unstable and warrants tight security measures. He has associated only with the more unstable inmate groups and has not been willing to better himself. All attempts at trying to help him have been unsuccessful and it is impossible to establish rapport with him because of his passive defiant attitude. He is certainly not a candidate for parole consideration and the Committee strongly recommends that he should be kept for a longer period of treatment and training. . . .

". . . Stringfellow continues to be quartered in Administrative Segregation, and is not a suitable candidate for return to population. . . ."

From a Summary of Stringfellow's record before the Federal Parole Board:

"Stringfellow still is a problem in this institution. It is necessary to keep him in restriction most of the time. He admits that he spent several months in segregation following his attempt to saw the bars and escape in November, 1959. As recently as October, 1960, he viciously attacked another inmate by assaulting him with a chair. He is in segregation at the present time for this infraction. The progress report states that reports are constantly received about this boy. He is a negative influence on others. . . .

"We have a feeble-minded individual who enjoys committing antisocial acts to impress other inmates. The institution has considered recommending transfer to a penitentiary. Most of the past year has been spent in restrictive status."

Notwithstanding the facts hereinabove set forth, known to the prison authorities, as to his continuous and incorrigible propensity for violence, Stringfellow was permitted to live in an open, unguarded dormitory with over forty other prisoners, including petitioner; and various dangerous objects, such as heavy brooms, chairs and fire extinguishers, were always within his reach. Because of this culpable negligence on the part of the prison officials, Stringfellow was enabled to assault and gravely injure petitioner; by reason of which petitioner sued the United States under the Federal Tort Claims Act, but was denied recovery on the alleged ground that he, as a prisoner, was subject to this "calculated risk," not applied to other persons.

REASONS FOR GRANTING THE WRIT

This petition raises serious and substantial constitutional questions under the Fifth and Fourteenth Amendments to the Constitution, relating to the right of inmates of federal prisons to obtain redress for injuries inflicted upon them while confined.

The Federal Tort Claims Act provides that the "United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §2674.

In *United States* v. *Muniz*, 374 U.S. 150, 158, 159, 165-66 (1963), this Court stated:

> "Considering the plain import of the statutory language, the number of prisoner's claims among the individual applications for private bills leading to the passage of the Federal Tort Claims Act, the frequent mention of a prisoner-claim exception in proposed bills, the reference, among others, to New York law, which permitted recovery by prisoners, we believe it is clear that Congress intended to waive sovereign immunity in cases arising from prisoners' claims. . . .
>
> ". . . the Government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The Act extends to novel and unprecedented forms of liability as well. . . .
>
> "The Federal Tort Claims Act provides much-needed relief to those suffering injury from the negligence of government employees. We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress. As we said in *Rayonier, Inc.* v. *United States*, . . . [352 U.S. at] 320, 77 S. Ct. at 377, 'There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.'"

The philosophy behind that decision is clearly that a person who is injured while a prisoner in the federal prisons is to be treated, for the purposes of this statute,

just as any other person with a tort claim against the government. The decision of the District Court in this case, however, as affirmed by the Court of Appeals, has clearly been discriminatory against prisoners as a result of the use by the District Court of the spurious doctrine of "calculated risk," not applicable to other persons. Purporting to follow the law of the State of Washington, the District Judge relied on so-called expert testimony in making its ruling:

> "Accordingly, it is, we are told, standard practice in modern penal institutions to take calculated risks in various aspects of prison life, housing, work, recreation, religious worship and others, so that prisoners may learn to get along with other persons as part of the rehabilitation process. The result is, that from time to time, there occurs an episode such as that here involved in which the gamble is lost and another prisoner injured.
>
> ". . . we ask prisoners to take risks in the process of attempting to rehabilitate as many as possible, a result greatly in the community interest. If, as a consequence, one is injured through no fault of his own it seems unfortunate and unfair that he be made to accept his injuries as additional punishment. To date at least the law gives a prisoner so injured no right to compensation." 244 F. Supp. at 767, 768.

Thus, while purporting to decide the case upon the factual ground that the plaintiff had failed to prove the negligence of the prison officials, the District Judge actually allowed the witnesses presented by the Government to draw their own standard of liability based upon the completely new and novel doctrine of "calculated risk," never used in negligence cases in Washington. The Washington expert admitted that in the prisons of his state, inmates like Stringfellow would not have been kept in open

dormitories, nor given access to fire extinguishers. Nowhere in the law of Washington is there a doctrine of "calculated risk". In the case of *McLeod* v. *Grant County School Dist. No. 128*, 42 Wash. 2d 316, 255 P. 2d 360 (1953), the Washington Supreme Court laid down the following general propositions of law which are applicable to the instant case:

> "The harm which came to appellant was not caused by the direct act or omission of the School District, but by the intervening act of third persons. The fact that the danger stems from such an intervening act, however, does not of itself exonerate a defendant from negligence. If, under the assumed facts, such intervening force is reasonably foreseeable, a finding of negligence may be predicated thereon. *Berglund* v. *Spokane County*, 4 Wash. 2d 309, 103 P. 2d 355; Prosser on Torts, 354, Sec. 49.
>
> "This principle has special application in cases, such as the one before us where the defendant has custody of the plaintiff." *Id.* at 320, 103 P. 2d at 362.

The Washington Supreme Court then noted and applied Sec. 320 of Restatement of Torts:

> "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty of exercising reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

"(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

"(b) knows or should know of the necessity and opportunity for exercising such control." *Ibid.*

The Washington court in *McLeod* repeatedly states the rule that liability is to be found if the danger causing the injury could have been *reasonably anticipated.* The District Judge expressly recognizes that occurrences such as this are reasonably to be anticipated when he states that "from time to time, there occurs an episode such as that here involved in which the gamble is lost and another prisoner is injured."

It should be noted that the courts of the State of Washington have rejected the contention that the jailers' duty to a prisoner to keep him in health and safety involves matter of discretion.

In *Kusah* v. *McCorkle,* 100 Wash. 318, 170 P. 1023 (1918), evidence showed that a prisoner suspected of insanity had been placed in the same cell with the plaintiff, and that the Sheriff's deputy had not searched the insane suspect for weapons. Thereafter, the prisoner stabbed the plaintiff with a knife, causing the injuries on which plaintiff sued. The Supreme Court of Washington stated, at p. 1025, that the jailer "owes the direct duty to a prisoner to keep him in health and free from harm, and for any breach of such duty resulting in injury he is liable to the prisoner."

The court in *Kusah* said, at p. 324, 170 P. at 1025:

". . . the question of whether the Sheriff or his deputy was negligent in his manner of keeping the prisoners together in one common room of the jail, depends on a number of circumstances, among which

> was the question of *what was safest and most humane for the prisoners;* what was most conducive to their health, well being and safety; *the character of the prisoners themselves* and their conduct; and possibly a number of other circumstances."

See also cases collected in 14 A.L.R. 2d 353, "Civil Liability of Sheriff or other Officer charged with Keeping Jail or Prison for Death or Injury of Prisoner" and particularly Sec. 6 thereof, "Assaults by Other Prisoners"; Woody, "Recovery by Federal Prisoners Under the Federal Tort Claims Act," 36 Wash L. Rev. 338, 358.

As a result of the ruling by the District Court, petitioner has been denied the equal protection of the laws in that a rule has been constructed, with no legal basis therefor, which is to be applied only to federal prisoners. Surely, it could not be contended that a patient in a federal hospital would be unable to recover as the result of an unprovoked assault by another patient known to have such tendencies, because it was a calculated risk by the hospital authorities that such persons be allowed to mingle with the other patients as it would be good therapy for them, and at the same time assign just one person to watch three floors in such institution. A ruling such as that handed down here is against the clear meaning and intent of the Federal Tort Claims Act as defined by this Court in *Muniz.* This is a clear instance of judicial legislation which has no basis in reason or authority and which, in effect, creates second-class citizenship for some people. In fact, such action is against the express policy of Congress, which has charged the Bureau of Prisons with the duty of providing "suitable quarters and (to) provide for the *safekeeping, care . . . protection . . . and discipline"* of federal prisoners (18 U.S.C. §4042). (emphasis added)

Another reason for granting certiorari in this proceeding is to resolve the conflict between circuits on the standard of care to be applied in cases such as this. A very similar case is *Cohen* v. *United States,* 252 F. Supp. 679 (N.D. Ga., 1966). That case held that the standard of care due a prisoner is the "exercise [of] ordinary care for the prisoner's protection and to keep him safe and free from harm." In that case, as this, an inmate of a federal prison had been maliciously assaulted by another prisoner. In that case, however, the prisoners were not kept in a common cell, but the assaulter was confined in a special inner portion of the prison because of his known violent tendencies. (The assaulter of petitioner had such known tendencies, but was not segregated.) Despite this precaution, the prisoner succeeded in escaping from an exercise yard and attacking Cohen. In holding the United States liable, the court there said:

> "While there is some element of an incontestible administrative decision regarding the condition of confinement between the prison officials and the person confined, as regards third persons, (including other prisoners), it is reasonable to conclude that some duty of care is owed in this regard. As seen, the government has a duty of protection and safekeeping. In the discharge of that duty the government must exercise ordinary care in (1) the classification of prisoners and in (2) the custody of prisoners properly classified.
>
> "Thus, upon admission of an inmate, a reasonable assignment to a proper custody category, i.e., minimum, medium, maximum, etc. must be made on the basis of prior record and mental and psychiatric reports on the prisoner. This is a continuing duty and possible reclassification may result from behavior, further testing, and observation during the course of confinement. . . .

". . . What constitutes proper supervision of a minimum or medium prisoner would fall far short of what constitutes proper supervision of a person in maximum segregation as 'unmanageable or dangerous.' As seen, the government was on notice of McDonald's psychotic tendency and the 'considerable likelihood of his having recurrent psychotic episodes.' . . . To state that the care taken was sufficient for 'most' cases or generally accepted procedure in penal institutions omits the human failure of those persons charged with the direct operational duty of keeping such segregated prisoners confined. . . .

". . . However, *where an assaultive individual has a psychiatric record such as the one revealed here, it would be negligence to grant him the freedoms of any other prisoner.* Having made the proper decision to place McDonald in maximum segregation, the government was bound to take the necessary steps to enforce that decision. In this respect it failed.

". . . But here, the government failed to provide protection when it had already decided protection was necessary. We are persuaded in this finding by the existing burdens placed on government institutions when psychiatric problems are involved." (Emphasis added) 252 F. Supp. at 688, 689.

From this decision it is easy to see that the two courts have used two widely divergent theories in reaching their conclusions. In *Cohen* the District Court looked to the duty of the government to protect prisoners from known dangerous criminals, while the District Judge in this case looked, not to the duty of care owed to petitioner, but only to the duty allegedly owed by the prison officials to "the community interest" and to the novel approach of a calculated risk. Certainly, the fact that a person has been convicted of a crime does not mean that he must be exposed to known risks in the interest of a gamble which is

lost from time to time. To subject him to such gamble is to discriminate against him, contrary to the Fifth and Fourteenth Amendments to the Constitution. If the theory used by the District Judge in this case is allowed to stand, there will be a distinct tendency for all federal courts in suits such as this to decide factual issues of negligence on an unsanctioned policy of allowing prison authorities to set their own standard of care. The morale of prisons would be affected disastrously and the will of Congress flouted.

CONCLUSION

The Petition for the Writ of Certiorari should be granted and the judgments below reversed.

Respectfully submitted,

ELMER GERTZ,
Attorney for Petitioner.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965 — APRIL SESSION, 1966

No. 15433

CLINTON MARTIN FLEISHOUR,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 7, 1966

Before HASTINGS, *Chief Judge,* KNOCH, *Circuit Judge,* and GRUBB, *District Judge.*

KNOCH, *Circuit Judge.* The plaintiff-appellant, Clinton Martin Fleishour, sued under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2674, to recover damages for personal injuries arising out of an incident at McNeil Island, Washington, a federal penitentiary, when he was assaulted and battered by a fellow prisoner, Troy Lee Stringfellow. The case was tried on the severed issue of liability alone.

The plaintiff's position is that the government was charged with the duty of providing him with suitable quarters, care and protection from assaults of other prisoners, and that the government was negligent in failing to prevent injury to him. The plaintiff argues that the government was well aware of the danger as Stringfellow had a

long record of misconduct in the comparatively unrestricted reformatory at Lampoc, California, from which he and the plaintiff were transferred to the medium security of McNeil Island. The plaintiff contends that despite the warnings of Stringfellow's violent proclivities, the government was negligent in the manner of housing the transferees in the Admissions and Orientation building, where they were kept from arrival on December 13th to December 15/16, 1960, the night of the assault. The sleeping area in that building includes a dormitory with two rows of beds on the first floor, and three floors above which each contain a cell block of 20 individual cells. On the night of the assault the number of prisoners exceeded the number of individual cells. About 40 prisoners, including plaintiff and Stringfellow, were assigned to the dormitory room.

At about 2:30 a.m. Stringfellow struck the sleeping plaintiff with a fire extinguisher, which had been on the wall of the dormitory, inflicting serious injury. At this time, the Senior Correctional Officer, responsible for supervision of the three cell blocks and the dormitory floor, was sorting mail at his station desk on the floor above the dormitory. He came down to investigate the noise and found Stringfellow being restrained by a fellow inmate. The plaintiff was on the floor bleeding profusely.

The government contends (inter alia) that jurisdiction under the Federal Tort Claims Act was lacking because the action was based on an exercise of a discretionary function involving a decision that on transfer to a new place of confinement, federal prisoners will be treated as having a "clean slate" and not be placed in solitary confinement for disciplinary infractions committed at the institution from which they have been removed.

The District Judge concluded that the Complaint was not addressed merely to high level policy decisions but dealt with such "operational" level questions as adequate guarding or supervision and the presence of a fire extinguisher in the room.

It is agreed that the test of government liability under the Act turns on "whether a private individual under like circumstances should be liable under state law." *U. S.* v. *Muniz*, 1963, 374 U. S. 150, 153. The issue of negligence is governed by the law of the State of Washington where the alleged negligence occurred. *Stewart* v. *U. S.*, 7 Cir., 1951, 186 F. 2d 627, 630, cert. den. 341 U. S. 940. Under Washington law, there must be proof of negligence, *U. S.* v. *Coffey*, 9 Cir., 1956, 233 F. 2d 41, 43; custodial officials are presumed to have carried out their duties properly, although that is a rebuttable presumption. *Eberhart* v. *Murphy*, 1920, 113 Wash. 449, 194 Pac. 415, 417; *Riggs* v. *German*, 1914, 81 Wash. 128, 142 Pac. 479. The existence of negligence presents an issue for the trier of the facts. *Perry* v. *Seattle School District No. 1*, 1965, Wash., 405 P. 2d 589, 592.

The evidence shows, as the District Judge concluded, that all of the transferees had been trouble makers and had disciplinary problems at Lampoc—although plaintiff argues that Stringfellow's record was much more serious than his own.

In addition to the testimony of the plaintiff, made available by deposition, the District Judge had the benefit of expert penologist witnesses, from which evidence he determined that it was accepted practice when prisoners were transferred from an institution where they have had conflicts with the authorities and have failed to make a satisfactory adjustment, to give them an opportunity to make a fresh start at the new institution.

The District Court held that the officials at McNeil had acted reasonably in a manner consistent with accepted prison practice at the time involved; that plaintiff had not established by a preponderance of the evidence that the officials were negligent. He entered judgment for the defendant.

As to the presence of a fire extinguisher, there was testimony to the effect that fire fighting equipment was essential and, as the inmates must themselves participate in fighting fires, the equipment has to be readily available to them.

An infinite variety of objects may be used as weapons, as the testimony indicated, and the District Court recognized that all such objects could not be removed. One expert witness said that one of the most serious cases of injury of one prisoner by another which he had seen had been caused by a prisoner in church armed with a heavy Bible, but that this was the first attack to his knowledge with a fire extinguisher removed from the wall.

The District Court in speaking of the impracticability of complete isolation for all prisoners of assaultive tendencies and its fatal effect on any hope of rehabilitation, made reference to "calculated risks."

The plaintiff argues that taking a calculated risk indicates that plaintiff's jailers foresaw the risk of harm to him but took no appropriate preventive action. We think that plaintiff has misinterpreted the Judge's use of this phrase. It is clear that he found no negligence on the part of the defendant. His determination finds support in the record and cannot be said to be clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure. His judgment must be affirmed.

AFFIRMED.

APPENDIX "B"

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

Fifth Amendment to the United States Constitution:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

Fourteenth Amendment to the United States Constitution:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

18 U.S.C. §4042:

> "The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> (1) have charge of the management and regulation of all Federal Penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction and discipline of all persons charged with or convicted of offenses against the United States.
>
> This section shall not apply to military or naval penal or correctional institutions or the persons confined therein."

28 U.S.C. §1346(b):

"Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. §2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 611

CLINTON MARTIN FLEISHOUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not yet reported. The opinion of the United States District Court for the Northern District of Illinois is reported at 365 F. 2d 126.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1966. The petition for a writ of certiorari was filed on September 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner was assaulted and injured by a fellow prisoner in the federal penitentiary at McNeil Island,

239-140—66

Washington. The question presented is whether the district court's finding—affirmed by the court of appeals—that federal prison officials were not negligent and exercised reasonable care for petitioner's safety is clearly erroneous.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act provide:

28 U.S.C. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

STATEMENT

In this suit under the Federal Tort Claims Act,[1] petitioner sought to hold the United States liable for personal injuries which he suffered when attacked by a fellow prisoner at the federal penitentiary at McNeil Island, Washington. The facts are not in dispute. Petitioner and his assailant, one Troy Stringfellow, were young offenders serving sentences for violations of the Dyer Act.[2] Initially they were confined at the Federal Correctional Institution at Lompoc, California, an institution designed primarily for younger prisoners. However, neither was able to conform his behavior satisfactorily to the requirements of the relatively unrestricted Lompoc environment. For this reason both were transferred to the federal penitentiary at McNeil Island in the State of Washington. That institution contains older inmates under more restricted conditions.

At McNeil Island, petitioner and Stringfellow, together with other newly transferred prisoners, were temporarily assigned to the Admissions and Orientation Unit of the penitentiary. This was the regular procedure for all new inmates pending a review of their records and permanent assignment to a specific program within the prison. The Admissions Unit was quartered in a large dormitory room and in a series of single-occupant cells on three floors above the dormitory. At night, when the prisoners

[1] 28 U.S.C. 1346(b), 2671 *ff.*

[2] 18 U.S.C. 2311–2313 (interstate transportation of stolen motor vehicles).

were asleep, the entire unit was regularly patrolled by a correctional officer. Both petitioner and Stringfellow were assigned to sleep in the dormitory.

At 2:30 a.m. on December 16, 1962, just three days after their arrival at McNeil Island, Stringfellow struck petitioner with a wall-type fire extinguisher, inflicting substantial harm. Stringfellow was caught and restrained by other prisoners; petitioner, who stated that he had been unacquainted with Stringfellow until their arrival at McNeil Island, could suggest no motive for the assault.

The principal thrust of petitioner's complaint in the instant suit against the United States was that the prison authorities should have been aware of Stringfellow's propensity for violence and were, therefore, negligent in failing "to confine him to a single cell or private room under * * * constant supervision" (App. 5–6).[3] Additionally, petitioner urged that it was negligent to allow dangerous weapons, *i.e.*, wall fire extinguishers, to remain within the reach of the prisoners.

At the trial in the district court the government called as witnesses the heads of the penitentiary systems of the States of Missouri and Washington, both of whom were also familiar with federal prisons and concededly expert penologists, (App. 105, 156). Those witnesses testified that the procedures followed at the McNeil Island penitentiary were in accord with modern penological practice. Moreover, contrary to petitioner's contentions, the witnesses testified that it would have been penologically unsound to have segregated

[3] "App." refers to Appellant's Appendix in the court of appeals.

Stringfellow upon his arrival at McNeil Island penitentiary on the basis of his prior poor behavior record at the institution for youthful offenders. To have done so, they stated, would have been to mark him as a "tough" whom the authorities could not handle, with the result of reinforcing his undesirable behavior and making his rehabilitation far more difficult. Furthermore, they stressed that the most succesful means of reforming a young offender who has been misbehaving at a youth institution was to give him a fresh start in another penitentiary with a more restrictive atmosphere and an older inmate population where he could no longer throw his weight around. After examining Stringfellow's record at the youth institution, the witness rejected the suggestion that Stringfellow was a particularly serious behavior problem, no more so than was petitioner himself whose record was comparable (App. 145).

There was further testimony that it was practically impossible to remove all possible weapons from the hands of prisoners, that the presence of fire extinguishers in the dormitory was a necessity for the safety of the prisoners, and that there had never been any use of such fire extinguishers as weapons in the past (App. 129–131).

In addition, the head of the Washington State prison system testified that, had Stringfellow been in a Washington institution, he would not have been segregated but would have been allowed to sleep in a room with other prisoners (App. 167). He further testified, regarding prisoners transferred in Stringfellow's circumstances, that Washington would have

followed a practice similar to that used at McNeil Island, that is to say, a prisoner with a poor record at a previous institution "starts off clean" in the new institution (App. 172). He added that the prison practices under consideration at McNeil Island in this case fully met the degree of care that would be exercised by Washington State officials in similar circumstances (App. 166).

Petitioner offered no contrary evidence regarding proper prison practices.

At the conclusion of the trial the district court entered judgment in favor of the government, ruling (244 F. Supp. 762, 767):

> It was the opinion of all the experts who testified that the officials at McNeil had acted reasonably and in a manner consistent with accepted prison practices at the time here involved. In the face of such testimony, the court cannot conclude that plaintiff has established by a preponderance of the evidence that these officials were negligent and judgment must therefore be entered for the defendants.

The court of appeals affirmed, holding that the trial court's "determination finds support in the record and cannot be said to be clearly erroneous." (Pet. App. 4a).

ARGUMENT

In this Federal Tort Claims Act suit, petitioner sought to prove the United States liable for injuries inflicted upon him by a fellow inmate in a federal prison. The district court dismissed the action after a trial on the merits, ruling that petitioner had failed

to establish negligence on the part of the prison officials. The Seventh Circuit affirmed the dismissal as supported on the record and not "clearly erroneous." Those decisions do not conflict with decisions of this or any other court, involve no issues of constitutional dimension, and present only contested questions of fact which both lower courts resolved against petitioner. Further review by this Court is therefore not warranted.

1. As both courts below correctly observed, under the Federal Tort Claims Act the government's liability in this case is measured by the law of Washington State where the tortious conduct allegedly occurred.[4] Under Washington law, a person is not liable in tort without proof of negligence;[5] custodial officials are presumed to have carried out their duties properly; one claiming injury as the result of their negligence has the burden of coming forward with evidence sufficient to rebut that presumption;[6] and the existence of such negligence is an issue to be resolved by the trier of facts.[7] The trial court's opinion makes clear that it properly applied those standards. After a careful review of the evidence before it, the district court ruled that petitioner had failed to establish his allegations of negligence "by a

[4] 28 U.S.C. 1346(b); *Richards* v. *United States*, 369 U.S. 1. See Pet. App. 3a and 244 F. Supp. at 766–767.

[5] *United States* v. *Coffey*, 233 F. 2d 41 (C.A. 3).

[6] *Eberhart* v. *Murphy*, 113 Wash, 449, 194 Pac. 415; *Riggs* v. *German*, 81 Wash. 128, 142 Pac. 479.

[7] *Perry* v. *Seattle School District No. 1*, 66 Wash. 2d 800, 804, 405 P. 2d 589, 592.

preponderance of the evidence," (244 F. Supp. at 767). It found instead that (244 F. Supp. at 764):

> The officials charged with maintenance of the United States Penitentiary at McNeil Island, Washington, carried out their duties with reasonable care under all the circumstances and therefore without negligence toward the plaintiff.

As the court of appeals noted in affirming the judgment dismissing the complaint, the trial court's decision is supported by evidence in the record and is not clearly erroneous (Pet. App. 4a). The correctness of factual findings, concurred in by two courts below, is not an issue meriting re-examination by this Court. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

2. Petitioner is mistaken in his contentions that the courts below failed to apply the proper standard of care due a federal prisoner and that, therefore, the instant case conflicts with the decisions in *United States* v. *Muniz*, 374 U.S. 150, and *Cohen* v. *United States*, 252 F. Supp. 679 (N.D. Ga.). As we noted above, the trial court based its determination against petitioner on its conclusion that the McNeil Island prison officials discharged their responsibilities towards him "with reasonable care under all the circumstances." Essentially the same standard of care was imposed by the district court in Georgia in the *Cohen* case, when it held that prison officials are required "to exercise ordinary care for the prisoner's protection and to keep him safe and free from harm." 252 F. Supp. at 687. In *Muniz*, the

Court dealt only with the issue of whether a federal prisoner was barred from bringing suit under the Federal Tort Claims Act by virtue of his prisoner status alone. Because the district courts had dismissed the complaints of both petitioners in *Muniz* before trial, the Court did not there address itself to the precise standard of care due all federal prisoners.

Petitioner's contention (Pet. 9) that the trial court applied a "doctrine of calculated risk" in deciding the issue of negligence is, as the court of appeals stated, a misinterpretation of the district court's use of that phrase. Read in the context of the opinion, that language was used by the court in refutation of petitioner's argument—advanced again here—that prisoners with "assaultive tendencies" must be kept in constant isolation if the government is to avoid tort liability for injuries stemming from inmate quarrels. The courts below properly rejected that contention as incorrect in law and undesirable in practice.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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